CHING YIK DEVELOPMENT SDN. BHD.

v.

SETAPAK HEIGHTS DEVELOPMENT SDN. BHD.

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
N.H. CHAN JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: W-02-262 OF 94]

CONTRACT: *Construction of terms of contract - Fundamental term - Subsidiary term - Distinction - Remedies available.*

CONTRACT: *Terms - Fundamental term, breach of - Whether innocent party entitled to discharge himself from obligations.*

CONTRACT: *Terms - Subsidiary term, breach of - Whether innocent party discharged from obligations - Whether may recover damages for non-performance of subsidiary term.*

CONTRACT: *Terms - Subsidiary term, breach of - Innocent party terminating contract pursuant to breach of non-fundamental term - Whether guilty of breach of contract.*

CONTRACT: *Sale and purchase of land - Purchase price, obligation to pay - Whether a fundamental term - Vendor's obligation on good title - Whether a fundamental term.*

This was the appellant's appeal against the order of the High Court striking out its action under O. 18 r. 19 of the Rules of the High Court 1980 ('the RHC').

The appellant had entered into a sale and purchase agreement ('the 1st agreement') for the purchase of a piece of property ('the property') from the respondent at the purchase price of RM4,990,000. Clause 5 ('cl. 5') of the 1st agreement required the respondent to effect a duly executed transfer to the appellant's solicitors pending the conclusion of the sale. Subsequently, the parties entered into another agreement ('the 2nd agreement') which provided for an increase of RM3 million in the purchase price of the property. Prior to the execution of both the agreements, the appellant had paid the sum of RM250,000 to the respondent as deposit, and had, subsequently, entered a private caveat on the property.

The respondent contended that the balance of the purchase price was due and payable not later than 30 July 1991 as the 1st agreement provided that the balance was to be paid within four months "from the date of the notification of the Development Order for the said Project." On 9 October 1992, the appellant issued a cheque for the sum of RM4,740,000 in purported payment of the balance of the purchase price. The respondent accepted this payment but the appellant stopped payment on the cheque.

Subsequently, the appellant commenced proceedings for specific performance. The respondent applied to have the appellant's action struck out under O. 18 r. 19 of the RHC. The learned Judicial Commissioner granted the respondent's application and struck out the appellant's action. His lordship held that the appellant had violated the 'essential terms' of both the agreements in respect of the payment of the purchase price and, therefore, had no cause of action by virtue of s. 23(b) of the Specific Relief Act 1950 ('the Act').

On appeal before the instant Court, Counsel for the appellant submitted that: (i) it was entitled to stop payment on the cheque as the respondent had failed to comply with cl. 5 of the 1st agreement; and (ii) the learned Judicial Commissioner had overlooked the lack of evidence to show that the development order had been obtained or that its existence had been communicated to the appellant.

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court)

[1a] In every contract, there are some terms that are of fundamental importance and others of lesser or minor importance. The law creates this distinction for the purpose of determining the kind of remedy that is to be made to the innocent party.

[1b] Where the term that has been flouted is fundamental to the contract, the innocent party is entitled to treat himself as being discharged from further obligations under it.

[1c] Conversely, where the obligation that has been breached is only subsidiary or minor in nature, the innocent party may not treat himself as being free of his obligations under the contract; he may, however, sue and recover damages for the non-performance of the subsidiary term.

[1d] A party who terminates a contract or treats it as having come to an end in reliance upon the breach of a non-fundamental term is himself guilty of a breach of contract.

[2] Whether a term is fundamental to the contract or merely a term of subsidiary importance depends very much on the way in which the particular contract is constructed.

[2b] In the absence of any special considerations in a contract for the sale of land, the obligation to pay the purchase price is a fundamental term. So too is a term that the vendor has good title to the property that is the subject matter of the sale. If the parties desire to make some other obligation fundamental in nature, they must make it dependent upon one or other of these terms.

[3] In the instant case, the stipulation in the 1st agreement as to the payment of the purchase price was a fundamental term. The appellant's failure to pay the purchase price was fatal to his action.

[4] The respondent's obligation (under cl. 5) to deliver the executed instrument of transfer was merely a subsidiary term, the non-performance of which did not relieve the appellant of his obligations under the contract.

[Appeal dismissed]

[Appeal from High Court Malaya, Kuala Lumpur; Civil Suit No: S1-22-455-93]

*[**Bahasa Malaysia** Translation of Headnotes]*

KONTRAK: *Pembentukan terma-terma kontrak - Terma-terma penting - Terma-terma subsidiari - Perbezaan - Remedi yang ada.*

KONTRAK: *Terma-terma - Kemungkiran terma penting - Samada pihak tidak bersalah berhak melepaskan diri daripada kewajipan.*

KONTRAK: *Terma-terma - Kemungkiran terma subsidiari - Samada pihak tidak bersalah terlepas daripada kewajipan - Samada boleh mendapatkan semula gantirugi bagi ketidak-laksanaan terma subsidiari.*

KONTRAK: *Terma-terma - Kemungkiran terma subsidiari - Pihak tidak bersalah menamatkan kontrak selaras dengan kemungkiran terma tak penting - Samada bersalah atas kemungkiran kontrak.*

KONTRAK: *Penjualan dan pembelian tanah - Harga belian, tanggungjawab untuk membayar - Samada merupakan terma yang penting - Kewajipan penjual di atas hakmilik yang baik - Samada satu terma yang penting.*

Ini adalah rayuan perayu terhadap perintah Mahkamah Tinggi membatalkan tindakannya di bawah A.18 k. 19 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT tersebut').

Perayu tersebut telah memasuki satu perjanjian jualbeli ('perjanjian pertama') bagi pembelian sebuah hartanah ('hartanah tersebut') daripada responden pada harga belian sebanyak RM4,990,000. Fasal 5 ('cl. 5') perjanjian pertama tersebut menghendaki responden menguatkuasakan satu pindahmilik yang telah disempurnakan kepada peguamcara perayu sementara menantikan pengikatan penjualan itu. Kemudiannya, pihak-pihak tersebut telah memasuki satu perjanjian yang lain ('perjanjian kedua') yang mana memperuntukkan satu kenaikan sebanyak RM3 juta dalam harga belian hartanah tersebut. Sebelum penyempurnaan kedua-dua perjanjian tersebut, perayu telah membayar jumlah sebanyak RM250,000 kepada responden sebagai deposit, dan telah berikutan itu, memasukkan satu kaveat persendirian ke atas hartanah itu.

Responden menegaskan bahawa baki harga belian kena dibayar tidak lewat daripada 30 Julai 1991 kerana perjanjian pertama memperuntukkan bahawa baki tersebut hendaklah dibayar dalam tempoh empat bulan daripada tarikh pemberitahuan mengenai perintah pembangunan bagi Projek tersebut. Pada 9 Oktober 1992, perayu telah mengeluarkan satu cek berjumlah RM4,740,000 yang dimaksudkan sebagai pembayaran baki harga belian itu. Responden telah menerima cek ini tetapi perayu telah menahan pembayaran ke atas cek itu.

Kemudiannya, perayu telah memulakan prosiding untuk pelaksanaan spesifik. Responden telah memohon supaya tindakan perayu ini dibatalkan di bawah A. 18 k. 19 KMT. Pesuruhjaya Kehakiman yang bijaksana telah membenarkan permohonan responden dan telah membatalkan tindakan perayu. Yang Arif memutuskan bahawa perayu telah melanggari terma-terma penting kedua-dua perjanjian tersebut berhubung dengan pembayaran harga belian dan, dengan itu, tidak mempunyai kausa tindakan menurut s. 23(b) Akta Relief Spesifik 1950 ('Akta tersebut').

Atas rayuan di hadapan Mahkamah, Peguam bagi pihak perayu berhujah bahawa: (i) ianya berhak untuk menghentikan pembayaran ke atas cek tersebut kerana responden telah gagal untuk mematuhi cl. 5 perjanjian pertama tersebut; dan (ii) Pesuruhjaya Kehakiman telah tidak mempedulikan ketiadaan keterangan bagi menunjukkan bahawa perintah pembangunan tersebut telah diperolehi atau bahawa kewujudannya telah disampaikan kepada perayu.

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1a] Dalam setiap satu kontrak, terdapat beberapa terma yang amat penting dan juga terdapat terma-terma yang tidak sebegitu penting atau pun hanya suatu kepentingan kecil sahaja. Undang-undang mewujudkan perbezaan ini bagi tujuan menentukan jenis remedi yang harus dibuat kepada pihak yang tidak bersalah.

[1b] Di mana terma yang telah dilanggari itu merupakan terma yang penting kepada kontrak tersebut, pihak yang tidak bersalah berhak untuk menganggapkan dirinya sebagai telah dilepaskan daripada kewajipan-kewajipan yang seterusnya di bawah kontrak tersebut.

[1c] Sebaliknya, di mana kewajipan yang telah dimungkiri itu adalah hanya bersifat subsidiari atau kecil sahaja, pihak yang tidak bersalah tidak boleh menganggapkan dirinya sebagai terlepas daripada kewajipan-kewajipannya di bawah kontrak tersebut; beliau boleh, namun begitu, mendakwa dan mendapatkan semula gantirugi bagi ketidak-laksanaan terma subsidiari itu.

[1d] Sesuatu pihak yang menamatkan sesebuah kontrak atau menganggapkannya sebagai telah tamat bergantung pada kemungkiran terma yang tidak penting adalah dengan sendirinya bersalah atas kemungkiran kontrak.

[2] Samada sesuatu terma itu penting kepada kontrak atau hanya merupakan kepentingan yang bersifat subsidiari sahaja bergantung lebih-lebihnya pada cara dalam mana kontrak yang khusus itu dibentuk.

[3] Dengan ketiadaan apa-apa penimbangan khas dalam sesebuah kontrak bagi penjualan tanah, kewajipan untuk membayar harga belian adalah merupakan terma utama atau penting. Begitu juga dengan terma bahawa penjual mempunyai hakmilik yang baik atau yang sah bagi hartanah tersebut yang merupakan halperkara penjualan tersebut. Jika pihak-pihak tersebut ingin untuk menjadikan sesuatu kewajipan yang lain sebagai bersifat utama atau penting, mereka mesti menjadikannya bergantung kepada mana-mana satu daripada terma-terma ini.

[4] Dalam kes ini, ketetapan dalam perjanjian pertama berhubung dengan pembayaran harga belian adalah terma yang penting. Kegagalan perayu untuk membayar harga belian adalah memudaratkan tindakannya.

[5] Kewajipan responden (di bawah cl. 5) untuk menyampaikan suratcara pindahmilik yang telah disempurnakan adalah hanya merupakan satu terma

subsidiari sahaja, ketidak-laksanaannya tidak melepaskan perayu daripada kewajipan-kewajipannya di bawah kontrak tersebut.

[Rayuan ditolak]

Cases referred to:

Bettini v. Gye [1876] 1 QBD 183 ***(refd)***
Graves v. Legg [1854] 9 Ex. 709 ***(cit)***
Wallis v. Pratt [1910] 2 KB 1003 ***(refd)***
Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha [1962] 2 QB 26 ***(refd)***
Bowes v. Chaleyer [1923] 32 CLR 159 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19

For the appellant - T. Gunaseelan (Saranjit Singh with him); M/s. A. Zahari Kanapathy Thulasi
For the respondent - J.H. Low (Mohd. Izzam Zailani with him); M/s. Ching Tan & Assoc.

JUDGMENT

Gopal Sri Ram JCA:

This is an appeal against the order of the High Court at Kuala Lumpur striking out the appellant's action under the provisions of O. 18 r. 19 of the Rules of the High Court 1980. We heard and dismissed this appeal on 19 October 1995 without calling upon the respondent to address us. The reasons for our decision are now produced.

The facts of this case may be briefly stated as follows. The parties to this appeal entered into an agreement dated 13 October 1991, for the sale and purchase of a certain piece of property. The respondent, as owner of the property was the vendor and the appellant was the purchaser. The agreement recites the purchase price to be RM4,990,000. Clause 5 of the agreement requires the respondent to deliver-up a duly executed transfer to the apellant's solicitors to be held by them pending the conclusion of the sale. Such a provision is commonplace in the context of our conveyancing practice. It is merely to ensure that there is no undue delay in having the transfer adjudicated by the Collector of Stamp Duty to ascertain the amount of duty payable, so that the instrument may be properly stamped and in readiness for presentation to the registering authority when the time for completion arrives.

To return to the narrative, the parties, on 12 December 1991, entered into a second agreement which stipulates for an increase in the purchase price of RM3 million. In consequence of this second agreement, the appellant was obliged to pay a total purchase price of RM7,990,000. However, the appellant

contends that although the second agreement was voluntarily entered into and executed, the additional sum of RM3 million was never meant to be paid. The appellant had, on 7 June 1991, that is to say even before the first sale and purchase agreement had been executed, paid the respondent a sum of RM250,000 as a deposit for the purchase of the property in question. The appellant also entered a private caveat pending the completion of the sale to it.

Now, according to the respondent, the balance of the purchase price was due and payable not later than 30 July 1991. The first agreement provides in cl. 2 that the balance is to be paid by the appellant within four months "from the date of the notification of the Development Order for the said Project." Whether this was ever a live issue in the proceedings in the Court below is a matter we shall touch upon later in the judgment.

There is no dispute that the appellant sent a cheque in the sum of RM4,740,000 on 9 October 1992, in purported payment of the balance of the purchase price. Although the payment was, on the respondent's own evidence, made out of time, it was nevertheless accepted. But the cheque sent by the appellant was dishonoured. It was suggested before us by Counsel that payment on the cheque was stopped because the respondent had failed to comply with cl. 5 of the first agreement. If that was indeed the case, the easiest thing for the appellant to have done was to have informed the respondent that the funds were ready and available and that they would be paid across upon receipt of the transfer. There was certainly no necessity for the appellant to have gone through the elaborate process of sending the cheque and then stopping payment on it. So much for the probative value of the point taken. But we would *ex abundanti cautela* add that even if the appellant had acted in the way suggested a moment ago, it would not have amounted to a valid tender of payment in law, having regard to the terms of the agreement in question.

On 29 July 1993, the appellant commenced proceedings against the respondent for specific performance. The respondent, after delivering its defence on 2 July 1994, applied by way of a summons returnable in chambers to strike out the action. The respondent's application, which is dated the same date as its defence, was made generally under O. 18 r. 19 of the Rules of the High Court 1980. Affidavit evidence was filed in support of, and in opposition to, the respondent's summons. Counsel then put in written submissions. The learned Judicial Commissioner, on the strength of the material before him, granted the respondent's application and ordered the appellant's action to be struck out. He gave cogent reasons for making the order that he did. We think it appropriate to quote from his judgment. This is what he said:

> It is to be noted that although the defendant had accepted the plaintiff's cheque for the sum of RM4,740,000 (as the balance purchase price of the principal

agreement), it was dishonoured upon presentation and hence there was a default on the part of the plaintiff. There was also a failure on the part of the plaintiff to pay the sum of RM3 million pursuant to the supplementary agreement. Consequently, without the said payment for the sum of RM3 million (due on 30 July 1992), the duly executed memorandum of transfer was not forwarded by the defendant's solicitors to the plaintiff's solicitors for adjudication.

The defendant is willing to return the deposit sum of RM250,000 which was forfeited earlier so long as the plaintiff is willing to lift the private caveat lodged by the plaintiff. The plaintiff on the other hand, has obtained an extension of the caveat *vide* Originating Summons No. S2-24-287-94. As a result of the caveat, the defendant is unable to effect or register any dealings with the said property.

From the affidavits and the exhibits filed herein, it seems clear to me that the plaintiff has not complied with the provisions of both the principal agreement and the supplementary agreement in respect of the payment of the RM4,740,000 and RM3 million respectively as the said sums still remain unpaid. From the facts of this case, it is obvious to me that the plaintiff has violated an essential term of the principal agreement pertaining to the payment of the sum of RM4,740,000 and of the supplementary agreement pertaining to the payment of the sum of RM3 million. Section 23(b) of the Specific Relief Act 1950 (Act 137) provides that 'specific performance of a contract cannot be enforced in favour of a person who .... violates any essential terms of the contract that on his part remains to be performed.'

In *Lim Kim Swee v. Tan Meng Sam* [1960] MLJ 262, the plaintiff agreed to buy from the defendant a piece of land, the consideration of which was to be paid in two parts *viz.*:

(a) payment of some money to one B.K. Singh; and

(b) the satisfaction of a debt owed by the defendant to one Coelho, who at the time was a chargee of the land.

The plaintiff fulfilled the first part of his obligation but not the second part. The plaintiff commenced proceedings for specific performance but the Court of Appeal held that the plaintiff had no cause of action against the defendant until he had performed his part of the contract.

On the strength of s. 23(b) of the Specific Relief Act 1950 and on the authority of *Lim Kim Swee v. Tan Meng Sam, supra,* it is plain and obvious to me that the plaintiff has no cause of action and that the plaintiff's claim herein for specific performance and/or general damages is frivolous, vexatious and an abuse of the process of the Court.

In the circumstances, I hold that there are merits in the defendant's application under O. 18 r. 19 to strike the plaintiff's writ and statement of claim. I therefore strike out the plaintiff's writ and statement of claim with costs.

Before us, Counsel for the appellant criticised this judgment on two grounds. His first submission was to the effect that the learned Judicial Commissioner had erred in holding that the appellant was without a cause of action. He argued that the respondent had breached its obligation to deliver the instrument of transfer in accordance with the provision of cl. 5 of the first agreement and that the appellant was therefore entitled to withhold the payment of the balance of the purchase price. His second submission was that the learned Judicial Commissioner had overlooked the lack of any evidence to show that the development order had been obtained or that its existence had ever been communicated to the appellant. In these circumstances, he submitted, it was inappropriate for the Court to have acted under its summary jurisdiction and struck out the claim. We shall deal with each of the appellant's complaints in turn.

We first take the point concerning the breach of cl. 5. In dealing with the arguments on this point, it is necessary to hearken to first principles: for it is a failure to appreciate these, we apprehend, is the cause of confusion in the mind of the appellant.

Now, in every contract, be it for the sale of land or any other commodity, there are, generally speaking, some terms that are of fundamental importance and others of less or minor importance. The law creates the distinction for the purpose of determining the kind of remedy that is to be made available to an innocent party, i.e., the party who is not guilty of a breach. Where the term that has been flouted is fundamental to the contract, the innocent party is entitled to treat himself as being discharged from further obligations under it. But where the obligation that has been breached is only subsidiary or minor in nature, the innocent party may not treat himself as being free of his obligations under the contract, although he may sue and recover damages for the non-performance of the subsidiary term. The rules that operate in this area of the law of obligations produce a further consequence. A party who terminates a contract or treats it as having come to an end in reliance upon the breach of a non-fundamental term is himself guilty of a breach of a contract.

Whether a particular term is fundamental to the contract or merely a term of subsidiary importance depends very much on the way in which the particular contract is constructed. Nevertheless, we think it quite safe to state the principle in this way. Absent any special considerations in a contract for the sale of land, the obligation to pay the purchase price is a fundamental term. So too is a term that the vendor has good title to the property that is the subject-matter of the sale. If the parties desire to make some other obligation fundamental in nature, they must make it dependent upon one or other of these terms.

In support of the suggested approach we find it necessary to quote from two cases. The first is *Bettini v. Gye* [1876] 1 QBD 183 where, at p. 188, Blackburn J, when applying the test formulated by Parke B in *Graves v. Legg* [1854] 9 Ex. 709, at p. 716, said:

> [I]n the absence of such an express declaration, (that is, an express declaration in the contract of an intention to make the performance of a particular term a condition precedent or not a condition precedent) we think that **we are to look to the whole contract**, and applying the rule stated by Parke B, to be acknowledged, **see whether the particular stipulation goes to the root of the matter**, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages. Accordingly, as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent. (Emphasis added.)

The second is *Wallis v. Pratt* [1910] 2 KB 1003, at p. 1012, where Fletcher-Moulton LJ said:

> A party to a contract who has performed, or is ready and willing to perform, his obligations under that contract is entitled to the performance by the other contracting party of all the obligations which rest upon him. But from a very early period of our law it has been recognised that such obligations are not all of equal importance. **There are some which go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract.** Both classes are equally obligations under the contract, and the breach of any one of them entitles the other party to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance and (if he takes the proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract. (Emphasis added.)

Another approach to the problem in cases that involve synallagmatic contracts is to look at the consequences of the breach of the term in question. If the breach is of such a nature that it goes to the root of the contract, then the term broken is fundamental in nature. On the other hand, if the consequences of the breach complained of are not serious in the sense that they do not go to the root of the contract, then the term in question is a subsidiary one entitling the innocent party to recover damages but not to treat the contract as being at an end. Although this test is usually ascribed by textbook writers to the decision of the English Court of Appeal in *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha* [1962] 2 QB 26, it has a much older origin.

In *Bowes v. Chaleyer* [1923] 32 CLR 159, at p. 172, Isaacs and Rich JJ when dealing with a somewhat similar question said:

> We find ourselves unable to treat this as a simple and ordinary contract of sale. Its effect must be ascertained judicially. The actual incidents of the transaction are before us, and must be taken into account in estimating the importance of the particular provision in dispute, and **especially in estimating the potential effect on the contract as a whole of such a breach as that alleged.** But we do not mean to say that the general principles of law applicable here differ in the least from those which would be applicable if the case were one of ordinary sale. (Emphasis added.)

In *Hong Kong Fir Shipping (supra),* the same test was propounded, by Upjohn LJ in the following way (at p. 64):

> In my judgment the remedies open to the innocent party for breach of a stipulation which is not a condition strictly so called, **depend entirely upon the nature of the breach and its foreseeable consequences.** Breaches of stipulation fall, naturally, into two classes. First there is the case where the owner by his conduct indicates that he considers himself no longer bound to perform his part of the contract; in that case, of course, the charterer may accept the repudiation and treat the contract as at an end. The second class of case is, of course, the more usual one and that is where, due to misfortune such as the perils of the sea, engine failures, incompetence of the crew and so on, the owner is unable to perform a particular stipulation precisely in accordance with the terms of the contract try he ever so hard to remedy it. In that case the question to be answered is, **does the breach of the stipulation go so much to the root of the contract that it makes further commercial performance of the contract impossible, or in other words is the whole contract frustrated?** If yea, the innocent party may treat the contract as at an end. If nay, his claim sounds in damages only. (Emphasis added.)

In the same case, Diplock LJ, formulated the test in these words:

> There are, however, many contractual undertakings of a more complex character which cannot be categorised as being 'conditions' or 'warranties,' if the late 19th century meaning adopted in the Sale of Goods Act 1893, and used by Bowen LJ in *Bentsen v. Taylor, Sons & Co.* [1893] 2 QB 274, at p. 280 be given to those terms. Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and **the legal consequences of a breach of such a undertaking, unless provided for expressly in the contract depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a 'condition' or a 'warranty'.** For instance, to take Bramwell B's example in *Jackson v. Union Marine Insurance Co. Ltd.* LR 10 CP 125, at p. 142 itself, breach of an undertaking by a shipowner to sail with all possible dispatch to a named port does not necessarily relieve

a the charterer of further performance of his obligation under the charterparty, but if the breach is so prolonged that the contemplated voyage is frustrated it does have this effect. (Emphasis added.)

Applying either of the tests - the classical or the modern - to the facts of the present appeal, it is not difficult to recognise that, having regard to the b terms of the first sale agreement as a whole, the stipulation as to the payment of the purchase price is a fundamental term. Equally is it plain that the obligation to deliver the executed instrument of transfer is merely a subsidiary term, the non-performance of which does not relieve the appellant from his obligations under the contract. The learned Judicial Commissioner, therefore, c rightly gave effect to the principles that govern this case and held the appellant's failure to pay the purchase price to be fatal to its case.

There is no doubt, as was repeatedly pointed out to Counsel in the course of his argument, that the result may well have been different if, in the first agreement, the obligation on the part of his client to pay the purchase price d had been made conditional upon the delivery-up by the respondent of the memorandum of transfer. But that is not the case here. As it stands, the obligation on the part of the respondent to deliver the memorandum of transfer in question does not put an end to the contract. In as much as the appellant so assumed, it was wrong and consequently guilty of acting in breach of the e first agreement. And so it follows that the argument is entirely without merit.

We now take the second point made by Counsel. To remind ourselves, it has to do with the alleged failure of the respondent to communicate to the appellant about the issuance of the development order.

f Now, in the affidavit delivered on the respondent's behalf it was alleged that the additional RM3 million under the second agreement was due and payable, in accordance with its terms, within 30 days from the date of certification by the respondent's solicitors that the development order had been issued. The affidavit, proceeding on this basis, goes on to say that the last date for g performance expired on 30 July 1991. The affidavit delivered by the appellant does not contain an assertion that the respondent or its solicitors failed to inform it (the appellant) or its solicitors that the development order had been issued. Neither was this point raised in the course of argument. It therefore comes as no surprise that the Judge did not consider it. He is not to be faulted for h the omission and it is therefore not open for the appellant to make a suggestion to that effect. We referred to this matter earlier on in our judgment in the context of whether the point taken was a live issue. For the reasons we have given it is quite obvious that it is not.

In conclusion, we are of the view that this case does not raise any point of i principle but merely has to do with the construction of the particular contract

that was entered into by the parties by reference to the well-established rules that govern actions for breach of contract. The learned Judge was accordingly well within the summary jurisdiction conferred upon him by O. 18 r. 19 when he struck out the appellant's writ. Further, we are entirely satisfied that he proceeded upon correct principles when he granted the respondent's application.

For the reasons given, we came to the conclusion that the appeal was devoid of merit and accordingly dismissed it. The usual orders that are consequent upon a dismissal were also made. Additionally, we ordered that the offending caveat entered by the appellant *vide* Presentation No: 12767/91 against the register document of title be removed forthwith.

Reported by Gan Peng Chiang